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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. MARC TAVCAR, Defendant and Appellant.	B218443 (Los Angeles County Super. Ct. No. NA066379)

APPEAL from a judgment of the Superior Court of Los Angeles County. Charles D. Sheldon, Judge. Affirmed as modified.

Marcia C. Levine, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Zee Rodriguez and Erika D. Jackson, Deputies Attorney General, for Plaintiff and Respondent.

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INTRODUCTION

A jury convicted defendant and appellant Marc Tavcar (defendant) of the willful, deliberate and premeditated murder of Robert Friedman. On appeal, defendant argues that the trial court erred by instructing the jury with CALJIC No. 2.02, which concerns the sufficiency of circumstantial evidence to prove intent or mental state, rather than CALJIC No. 2.01, which concerns the sufficiency of circumstantial evidence generally. The People agree that the trial court erred, but contend that the error was harmless. We conclude that there is no reasonable probability that the outcome of the trial would have differed had the trial court instructed the jury with CALJIC No. 2.01. We therefore affirm the judgment.

BACKGROUND

A. Factual Background[1]

Robert Friedman was found dead in his San Pedro home on February 7, 2005. He had been killed by a single gunshot wound to the head. He was lying on his bed; his body had been covered by a comforter, and a leather sofa pillow—with what appeared to be a bullet hole through it—covered his head. His hands were tied behind his back with a terrycloth sash and there was a rope around his neck. Friedman's room had been ransacked, and a number of items—including a Dell laptop computer and Friedman's cellular telephone—were missing. His gold Lexus automobile was missing from the garage. Friedman's mother and brother testified that Friedman never loaned his car to anyone, and that he kept it in immaculate condition.

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[1] On appeal, "we must view the evidence in the light most favorable to the verdict and presume the existence of each fact that a rational juror could have found proved by the evidence. [Citation.]" (*People v. Rundle* (2008) 43 Cal.4th 76, 139-140, fn. 30, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

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From Friedman's apartment, police recovered, as relevant here, a nine-millimeter bullet fragment, a nine-millimeter bullet casing, a live nine-millimeter round, a burnt cigar with a plastic filter, two glasses, a wine bottle, and two desktop computers. They also recovered a used condom from the bathroom adjoining the bedroom.

Defendant's palm print was found on the wine bottle. Defendant's DNA profile matched DNA recovered from the cigar, the two glasses, and the condom. Data recovered from one of Friedman's computers showed that, on Thursday, February 3, 2005, an email had been sent to "sike_loc@yahoo.com," an email address registered to defendant. Police also recovered emails that had been sent to or received from various other email addresses between February 3 and 5, 2005, in which the participants discussed arranging meetings and engaging in sexual activities. Friedman had been known to engage in internet dating.

Two weeks after the murder, defendant was arrested by Mexican authorities in Mexicali, Mexico, after police officers saw him urinating in public. Defendant was with his girlfriend, Cardie Hicks. Defendant and Hicks were in possession of Friedman's Lexus; the front end of the car had been dented and the bumper was cracked. There were dollar signs on the car, as if to advertise that the car was for sale. In the car, Mexican police found a loaded nine-millimeter handgun, 83 rounds of nine-millimeter ammunition, and two or three cell phones. Friedman's laptop computer was found in the car's trunk. The keys were in the car; the ignition had not been tampered with. Friedman's house key also was on the key ring. Defendant tested positive for gunshot residue; Hicks tested negative. A Mexican firearm examiner determined that the handgun had been fired at some point.[2]

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[2] Possession of the handgun was a federal crime in Mexico. As a result, Los Angeles police officers were unable to retrieve the handgun from Mexican authorities. Mexican authorities provided the Los Angeles police with bullet casings fired from the handgun, but forensic analysis was inconclusive whether the bullet casing found in Friedman's bedroom had been fired from the handgun. Mexican authorities released defendant to the custody of the Los Angeles Police Department in February 2008, three years after he was arrested.

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Dametric McGee testified that Hicks was his sister. He knew defendant by the nickname Sike. Hicks sometimes stayed at McGee's house, and defendant would sometimes call her on McGee's home telephone. Friedman's telephone records indicated that several calls were made between Friedman's cell phone and McGee's home phone on February 6 and 7, 2005. McGee did not know Friedman.

Defendant did not testify.

B. Procedural Background

Defendant was charged with one count of willful, deliberate and premeditated murder (Pen. Code, § 187, subd. (a))[3] and one count of grand theft auto (§ 487, subd. (d)(1)). The information specially alleged that defendant personally had used and discharged a firearm (§§ 12022.5, subd. (a)(1); 12022.53, subds. (b)-(c)) and that his use of a firearm had caused Friedman's death (§ 12022.53, subd. (d)). The jury convicted defendant of both crimes and found true the enhancement allegations. The trial court sentenced defendant to 25 years to life on the murder count, plus 25 years to life on the section 12022.53, subdivision (d) enhancement. The other enhancement terms were stayed. The trial court sentenced defendant to a consecutive term of 8 months (one third of the mid term) on the auto theft charge, and applied defendant's presentence credit to that term only. Defendant timely appealed.

DISCUSSION

A trial court must instruct the jury, even without a request, on all general principles of law that are necessary for the jury's understanding of the case. (*People v. Burney* (2009) 47 Cal.4th 203, 246; see also *People v. Roldan* (2005) 35 Cal.4th 646, 715, disapproved on another ground in *People v. Doolin, supra,* 45 Cal.4th at p. 421, fn. 22; *People v. Johnson* (2009) 180 Cal.App.4th 702, 707 (*Johnson*).) We review a claim

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[3] Statutory references are to the Penal Code.

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of instructional error de novo. (*People v. Cole* (2004) 33 Cal.4th 1158, 1210; *Johnson, supra,* 180 Cal.App.4th at p. 707.) We consider the instructions as a whole and interpret them, if reasonably possible, to support rather than defeat the judgment. We look to the whole record, including the arguments of counsel, and we assume that the jurors are intelligent persons capable of understanding and correlating all jury instructions given. (*Johnson, supra,* 180 Cal.App.4th at p. 707; *People v. Martin* (2000) 78 Cal.App.4th 1107, 1111-1112.)

The People concede that the trial court erred by instructing the jury with CALJIC No. 2.02 rather than CALJIC No. 2.01. We accept the People's concession. When the prosecution substantially relies on circumstantial evidence to prove one or more elements of its case, the trial court has a sua sponte duty to instruct the jury on the general sufficiency of circumstantial evidence. (*People v. Bloyd* (1987) 43 Cal.3d 333, 351; *People v. Yrigoyen* (1955) 45 Cal.2d 46, 49.) Generally, the appropriate form instruction is CALJIC No. 2.01.[4] (See *People v. Bonilla* (2007) 41 Cal.4th 313, 338.) CALJIC No. 2.02 is an alternative instruction for use when the prosecution substantially relies on

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[4] That instruction states, "[A] finding of guilt as to any crime may not be based on circumstantial evidence unless the proved circumstances are not only (1) consistent with the theory that the defendant is guilty of the crime, but (2) cannot be reconciled with any other rational conclusion. [¶] Further, each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance on which the inference necessarily rests must be proved beyond a reasonable doubt. [¶] Also, if the circumstantial evidence [as to any particular count] permits two reasonable interpretations, one of which points to the defendant's guilt and the other to [his] [her] innocence, you must adopt that interpretation that points to the defendant's innocence, and reject that interpretation that points to [his] [her] guilt. [¶] If, on the other hand, one interpretation of this evidence appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable." These principles are also reflected in CALCRIM No. 224.

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circumstantial evidence to prove *only* the defendant's intent or mental state.[5] Because CALJIC No. 2.01 and CALJIC No. 2.02 are alternative instructions—with the broader scope of the former encompassing the more limited scope of the latter—they should not be given together. (*People v. Bloyd, supra,* 43 Cal.3d at p. 352.)

To convict defendant of first degree murder, the jury had to find beyond a reasonable doubt that (1) defendant killed Friedman, and (2) he did so with the premeditated intent to kill. (§§ 187, subd. (a), 189; see *People v. Concha* (2009) 47 Cal.4th 653, 662; *People v. Sanchez* (2001) 26 Cal.4th 834, 849.) An instruction pursuant to CALJIC 2.02 would have been appropriate if the circumstantial evidence related *only* to the elements of premeditation and intent. But in this case, the prosecution also relied exclusively on circumstantial evidence to prove defendant's identity as Friedman's killer. The trial court therefore had a sua sponte duty to instruct the jury with CALJIC No. 2.01 rather than CALJIC 2.02. The trial court erred.

The trial court's instructional error requires reversal, however, only if it is reasonably probable that defendant would have obtained a more favorable result had the jury properly been instructed. (Cal. Const., art. VI, § 13; *People v. Bloyd, supra,* 43 Cal.3d at p. 352 [incorrect circumstantial evidence instruction]; *People v. Watson* (1956)

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[5] That instruction states, "The [specific intent] [or] [and] [mental state] with which an act is done may be shown by the circumstances surrounding the commission of the act. However, you may not [find the defendant guilty of the crime charged [in Count[s] __, ___, ___, and __], [or] [the crime[s] of __, __, __, which [is a] [are] lesser crime[s]],] [or] [find the allegation ___ to be true,] unless the proved circumstances are not only (1) consistent with the theory that the defendant had the required [specific intent] [or] [and] [mental state] but (2) cannot be reconciled with any other rational conclusion. [¶] Also, if the evidence as to [any] [specific intent] [or] [mental state] permits two reasonable interpretations, one of which points to the existence of the [specific intent] [or] [mental state] and the other to its absence, you must adopt that interpretation which points to its absence. If, on the other hand, one interpretation of the evidence as to the [specific intent] [or] [mental state] appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable." These principles are also reflected in CALCRIM No. 225.

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46 Cal.2d 818, 836; see also *People v. Johnwell* (2004) 121 Cal.App.4th 1267, 1274.)[6] Defendant has failed to establish such prejudice.

The essential principles embodied in CALJIC 2.01 are (1) circumstantial evidence is sufficient to support a conviction if it is consistent with defendant's guilt and irreconcilable with any other rational conclusion; (2) the corollary rule that the jury must accept a reasonable interpretation of the circumstantial evidence that points to defendant's innocence; and (3) each fact upon which an inference of guilt rests must be proved beyond a reasonable doubt. Defendant has failed to establish a reasonable probability that his conviction violated any of these principles.

The jury was instructed that the People were required to prove defendant's guilt beyond a reasonable doubt, and that reasonable doubt was "not a mere possible doubt." The trial court instructed the jury pursuant to CALJIC 2.00 on the definition of circumstantial evidence and that "[a]n inference is a deduction of fact that may *logically and reasonably* be drawn from another fact or group of facts established by the evidence." (Italics added.) The trial court also instructed the jury with CALJIC 2.02, which expressed the same principles as CALJIC 2.01, albeit with respect to intent and mental state only.

Both attorneys emphasized the principles set forth in CALJIC 2.01 in their arguments to the jury. In her opening argument, the prosecutor told the jury, "[I]f one interpretation of the evidence appears to be reasonable and the other interpretation is unreasonable, you must . . . accept the reasonable interpretation and reject the unreasonable." She further stated that the jury could "find that [defendant] is not guilty if

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6 Defendant recognizes that, "[u]nder current California law, this court is required to apply" the harmless error standard of *Watson, supra,* 46 Cal.2d 818. To preserve his claim for further review, however, defendant contends that prejudice should be assessed under the harmless-beyond-a-reasonable-doubt standard of *Chapman v. California* (1967) 386 U.S. 18. Because we are bound by the California Supreme Court's explicit application of the *Watson* standard in *People v. Bloyd, supra,* 43 Cal.3d at pages 351-352, involving an error similar to the one here, we reject defendant's argument. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

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there is some other reasonable explanation for who killed Robert." Defense counsel told the jury, "But in this case, if a reasonable interpretation points to Mr. Tavcar's innocence, you must accept it." He elaborated, "Understand that when you have circumstantial evidence, that points to [defendant's] innocence . . . even if it is not as persuasive as the one that points to his guilt, you must adopt that one and you must find him not guilty." Defense counsel presented the jury with several alternative scenarios that, he contended, established that the prosecution's theory was not "the only reasonable possibility . . . ." In her closing argument, the prosecutor stated, "And counsel made a point of saying if there [are] two explanations, you must go with the one that points to no guilt. That's if there [are] two reasonable explanations. They have to be reasonable." Accordingly, based on the whole record, it is not reasonably probable that the jury was unaware of the principles set forth in CALJIC 2.01 when it deliberated.

Moreover, on appeal, defendant does not articulate any reasonable explanation for the circumstantial evidence that is consistent with defendant's innocence. To the contrary, the only reasonable inference from all of the circumstantial evidence was that defendant was the killer. The evidence showed that Friedman emailed defendant about meeting to engage in sexual activities shortly before the murder. Defendant's DNA and palm print placed defendant in Friedman's bedroom at about the time of the murder. Friedman's cell phone was missing; at about the time of the murder, telephone calls were placed from Friedman's cell phone to Dametric McGee's home telephone; defendant had been known to call that number to speak with Cardie Hicks. Two weeks later, defendant was apprehended in Mexico with Cardie Hicks, in possession of Friedman's car, laptop computer, and house key. Friedman was killed with a nine-millimeter handgun; when arrested, defendant was in possession of a nine-millimeter handgun and more than 80 rounds of nine-millimeter ammunition. Defendant's handgun could not be excluded as the murder weapon.

At trial, defense counsel argued that it was possible that Friedman had loaned his car and cellular telephone to defendant, unaware that the laptop was in the trunk of the car. Defense counsel further argued that, because Friedman also had exchanged emails

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with others about meeting up and engaging in sexual activities, Friedman might been killed by someone else. But these were not reasonably plausible theories. Friedman was reputed to be very careful about caring for his car; he was not known to loan it to others; and it was his only car. Defendant was found in possession of the car two *weeks* after the murder, several hundred miles away in Mexicali, Mexico, apparently attempting to sell the car. The key ring in defendant's possession contained not only the car keys, but also Friedman's *house* key. The evidence is not reasonably consistent with the theory that Friedman loaned defendant the car. Furthermore, no plausible explanation was advanced regarding why Friedman would loan his cell phone to defendant.

The theory that Friedman was killed by a second clandestine lover, who came to Friedman's house after defendant left, was mere speculation. It also was inconsistent with the evidence. The evidence showed that Friedman was a tidy person. It is not reasonable to infer that Friedman would have entertained a second lover after defendant left, but failed to flush the toilet containing defendant's used condom or clean up the dirty dishes and trash bearing defendant's palm print and DNA.

Relying on *People v. Salas* (1976) 58 Cal.App.3d 460 (*Salas*), defendant argues that the instruction pursuant to CALJIC 2.02 relating to evidence of intent or mental state "misled" the jury into believing that "the principle stated in [CALJIC 2.02] did not apply to the proof of any other factual matter." We note that the precise holding in *Salas*—that it was error not to instruct with CALJIC 2.02 with respect to a great bodily injury enhancement—was disapproved by the California Supreme Court in *People v. Wolcott* (1983) 34 Cal.3d 92, 109. To the extent defendant asks us to apply "[t]he logic of *Salas*," such logic does not apply here. The whole of the record in this case demonstrates that there is no reasonable probability that defendant would have obtained a more favorable result had the jury been instructed with CALJIC 2.01.

Defendant correctly challenges the amount of the construction fee in the abstract of judgment. The trial court imposed the construction fee of $30 at sentencing. (Gov. Code, § 70373.) The fee is accurately reflected in the minute order. The $330 fee reflected in the abstract of judgment is improper, for the oral pronouncement controls.

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(*People v. Mitchell* (2001) 26 Cal.4th 181, 185-186.) Thus, the abstract of judgment should be corrected to reflect the $30 fee.

DISPOSITION

The judgment is affirmed. The abstract of judgment should be corrected to reflect the $30 construction fee imposed by the trial court instead of the amount of $330.

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MOSK, J.

We concur:

ARMSTRONG, Acting P. J.

KRIEGLER, J.